

89-351 (1)

Supreme Court, U.S.

FILED

AUG 26 1989

JOSEPH P. SPANIOLO, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

TOWNSHIP OF KENNEDY,

Petitioner,

vs.

KENVUE DEVELOPMENT, INC.

and

KENVUE SERVICE COMPANY,

Respondents.

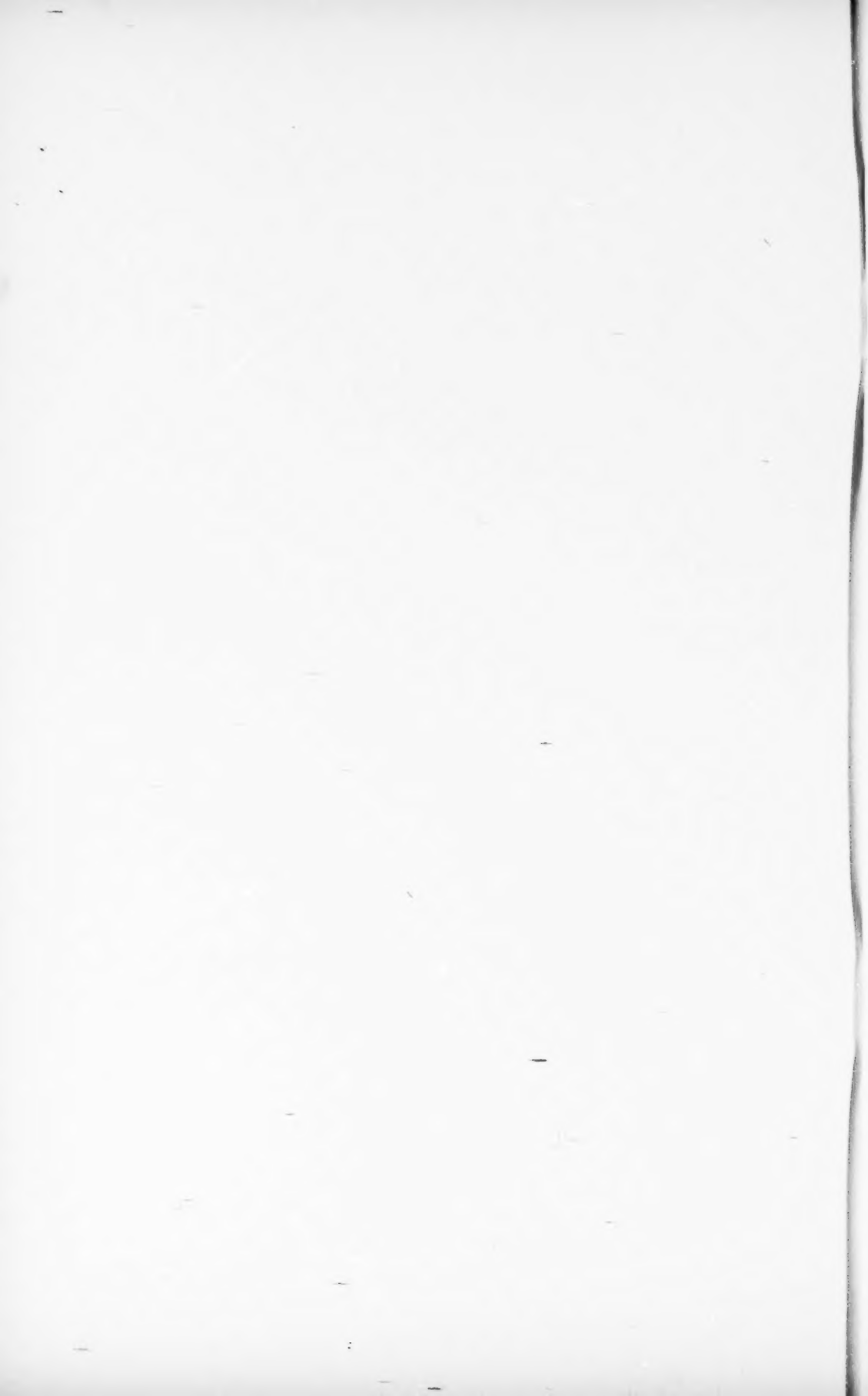
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Counsel for Petitioner



34 pp



Questions Presented

I. Whether the trial court's failure to grant petitioner an evidentiary hearing on its motion to disqualify counsel has deprived petitioner of due process?

II. Whether the Supreme Court of Pennsylvania by acquiescing in the use of the doctrine of laches by the trial court has thereby decided a question of substance in a way not in accord with applicable decisions of the Supreme Court of Pennsylvania and the United States Supreme Court?

ii.

List of All Parties to the Proceeding

1. Township of Kennedy
2. Kenvue Development, Inc.
3. Kenvue Service Company
4. Kennedy Township Municipal Sewage Authority

None of the listed parties are or have affiliates or subsidiaries.

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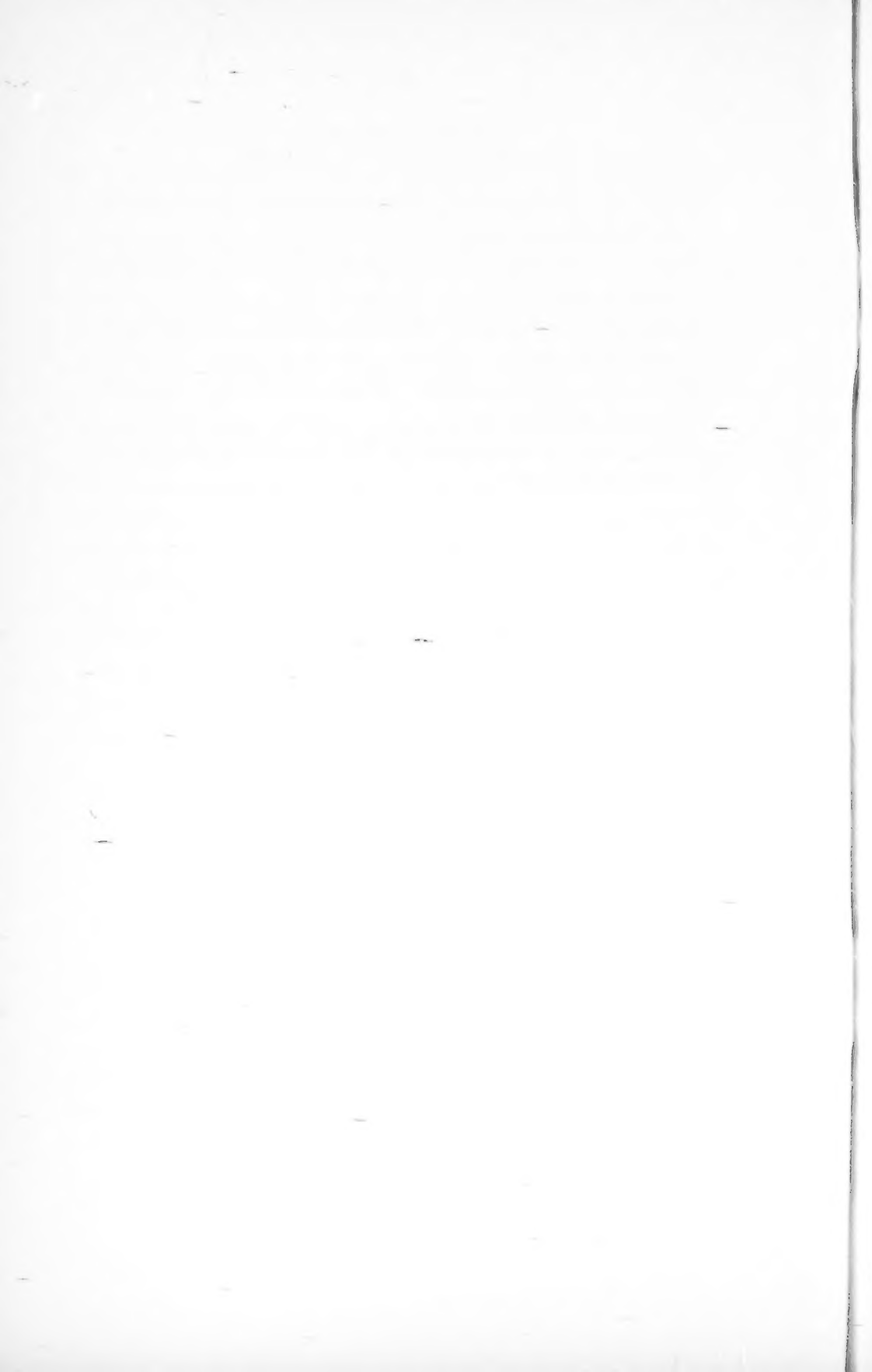
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IN THE
Supreme Court of the United States

October Term, 1989

No. _____

TOWNSHIP OF KENNEDY,

Petitioner,

vs.

KENVUE DEVELOPMENT, INC.,

and

KENVUE SERVICE COMPANY,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA**

Petitioner, Township of Kennedy, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this case on May 30, 1989.

Opinions Below

The Opinion and Order of the Court of Common Pleas of Allegheny County denying Kennedy Township's Motion to Disqualify is unreported and is printed in the Appendix hereto, pp. 4a-9a. The Order of the Court of Common Pleas of Allegheny County certifying that the denial of Kennedy Township's Motion to Disqualify involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may advance the ultimate termination of the case, is unreported and is printed in the Appendix hereto, at p. 3a. The Order of the Commonwealth Court of Pennsylvania denying permission to appeal is unreported and is printed in the Appendix hereto, at p. 2a. The Order of the Supreme Court of Pennsylvania denying Kennedy Township's Petition for Allowance of Appeal is unreported and is printed in the Appendix hereto, at p. 1a.

Jurisdiction

The Order of the Supreme Court of Pennsylvania denying the Township of Kennedy's Petition for Allowance of Appeal was entered on May 30, 1989, Appendix p. 1a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Code of Professional Responsibility, Disciplinary Rule 9-101(B), adopted by the Supreme Court of Pennsylvania provides:

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

The Code of Professional Responsibility, Disciplinary Rule 5-101(B), adopted by the Supreme Court of Pennsylvania provides:

A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

The Code of Professional Responsibility, Disciplinary Rule 5-102, adopted by the Supreme Court of Pennsylvania provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The Code of Professional Responsibility, Ethical Consideration 9-3, adopted by the Supreme Court of Pennsylvania provides:

After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

Statement of the Case

The Township of Kennedy ("Township"), a municipality located in Allegheny County, Pennsylvania, is a respondent together with the Kennedy Township Municipal Sewage Authority ("Authority") in a Petition filed by Kenvue Development, Inc. ("Kenvue Development") and Kenvue Service Company ("Kenvue Service") in the Court of Common Pleas of Allegheny County, Pennsylvania, to determine just compensation due as the result of an alleged *de facto* condemnation of their property.

Kenvue Development, Inc. acquired certain undeveloped property located in the Township of Kennedy in 1965. It developed the property into lots with single family homes without appropriate sewage treatment facilities. As a result, Kenvue Development was cited by the Pennsylvania Department of Environmental Resources for numerous violations of discharging raw sewage into the streams and tributaries which abutted its property. Subsequent to those citations, Kenvue Development urged the Township to apply for a temporary sewage treatment permit from the Pennsylvania Department of Environmental Resources which would allow Kenvue Development to operate a temporary sewage treatment facility to service the homes constructed by Kenvue Development on its property. A permit was granted to the Township of Kennedy—since permits were not permitted to private organizations such as Kenvue Development—upon the express condition that once Township sewers became available, the treatment plant would be abandoned and the Kenvue Service system would be interconnected with the Township system.

In 1975, the Kennedy Township Municipal Sewage Authority constructed a municipal sewer system for Kennedy Township pursuant to a Department of Environmental Resources permit. As a result of the conditions on the temporary permit granted to the Township which allowed Kenvue to operate a temporary sewage facility, the Department of Environmental Resources cancelled the sewage permit under which Kenvue Service operated and required, by a 1978 Order, that the Kenvue sewer system be connected with the Township system. This connection was to be effective on September 28, 1978.

On November 6, 1978, Kenvue Development and Kenvue Service filed a Petition for Appointment of Viewers to determine just compensation due alleging that the interconnection of its sewer lines with the Township lines was a *de facto* condemnation of Kenvue's property. The Township and the Authority filed Preliminary Objections in late 1978 which have not yet been decided.

During all of the proceedings to which the Department of Environmental Resources was a party, Richard S. Ehmann was Senior Litigator for the Department of Environmental Resources and directly represented that state agency in its successful attempt to have the temporary sewage permit revoked and Kenvue interconnect its lines with the newly created Township sewer lines.

During all of the proceedings involving the Department of Environmental Resources, the Township of Kennedy consulted, conferred and discussed with Mr. Ehmann the various strategies and courses of action regarding the Kenvue Development sewer system and the utilization of sewer lines running through Kenvue Development.

In January 1986, Mr. Ehmann left the Department of Environmental Resources and joined the firm of Hollinshead & Mendelson, counsel for both Kenvue Development and Kenvue Service. On July 24, 1987, Kennedy Township filed a Motion to Disqualify Hollinshead & Mendelson as counsel for Kenvue Development and Kenvue Service. Counter Motions to Disqualify Jubelirer, Pass & Intrieri, P.C. and Joseph J. Pass, were filed by Kenvue Development and Kenvue Service. All Motions to Disqualify were denied by an Order of Court of the Court of Common Pleas of Allegheny County, Pennsylvania, dated July 12, 1988. No evidentiary hearing was held prior to the denial of the Motions.

Kennedy Township thereupon filed a Petition for Permission to Appeal to the Commonwealth Court of Pennsylvania. It was in this Petition that Kennedy Township first raised the federal question of the due process requirement of hearing on its Motion. In its Petition to the Commonwealth Court of Pennsylvania, the Township raised the issue of the trial court's denial of the Township's due process by failing to hold an evidentiary hearing on its Motion for Disqualification.

The Township's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania raised anew the issue of deprivation of due process by the trial court's action. The Commonwealth Court of Pennsylvania denied the Petition for Permission to Appeal *per curiam* without an Opinion on October 13, 1988. Appendix at p. 2a. The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal in a *per curiam* Order without Opinion on May 30, 1989.

REASONS FOR GRANTING THE WRIT

I. The order from which petitioner appealed is a final order within the meaning of 28 U.S.C. §1257.

A judgment or decree of the state court must be final prior to review by the United States Supreme Court. Whether a state court judgment is subject to review by the Court on writ of certiorari is governed by the provisions of 28 U.S.C. §1257. *United States v. McDonald*, 435 U.S. 850 (1978), on remand, 585 F.2d 1211 (4th Cir. 1978), cert. denied, 444 U.S. 1091 (1979). Judgment must be rendered by the highest court of the state in which a decision could be had and only final judgments with respect to issues of federal law provide the basis for the Court's appellate jurisdiction. *New York Times Co. v. Jascalevich*, 439 U.S. 1317 (1978). It is a practical, as opposed to a technical, construction of the concept of finality which governs. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1948), cited in *Local No. 438 Construction and General Laborers Union v. Curry*, 371 U.S. 542, 549 (1963).

The Township of Kennedy's Motion to Disqualify was denied by the Court of Common Pleas of Allegheny County. Appendix, pp. 4a-9a. The Commonwealth Court of Pennsylvania denied the Township's Petition for permission to appeal Appendix, p. 2a, and the Supreme Court of Pennsylvania denied the Township's Petition for Allowance of Appeal from the Order of the Commonwealth Court. Although trial on the underlying issue in the Petition of Kenvue Development and Kenvue Service Company for the appointment of viewers to ascertain compensation due them arising from an alleged *de facto* condemnation of their properties in the Township remains, the Township's Motion to Disqualify Counsel falls "in that small class which finally

determined claims of rights separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Loan Corp.*, 337 U.S. at 546.

No further review of the issue of whether the Township will suffer deprivation of its due process rights based on the trial court's refusal to disqualify counsel is available by any state tribunal. The Township, by seeking permission to appeal the Order of the trial court to the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, has exhausted all state procedures for review. The Order of the Supreme Court of Pennsylvania is a final determination of a critical federal question and review of that issue is not available in any state court. *Mississippi Power & Light Co. v. Mississippi*, _____ U.S. _____, 101 L.Ed.2d 322, 108 S.Ct. 2428 (1988); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947); *Department of Banking v. Pink*, 317 U.S. 264 (1942), rehearing denied, 318 U.S. 802 (1943); *Gorman v. Washington University*, 316 U.S. 98 (1942), rehearing denied, 316 U.S. 711 (1942).

The federal question at issue here is not the underlying issue in the Petition for Appointment of Viewers, it is rather whether the continued representation of Kenvue Development, Inc. and Kenvue Service Company by counsel who actively participated as a public employee in prior litigation and the refusal of the trial court to provide an evidentiary hearing on that issue, deprives the Township of Kennedy its due process rights. In the event that counsel for Kenvue Development, Inc. and Kenvue Service Company is permitted to continue in his

representation, the Township faces a trial on the merits which deprives it of its due process rights. The Township would thus be stymied by a rule from which it cannot appeal and be forced to proceed to hearing on the merits with this critical federal question still at issue. Should the parties proceed to trial with this issue outstanding, and should Petitioner ultimately seek review and prevail on the issue of whether counsel's continued representation of Kenvue Development and Kenvue Service is improper, the outcome of the proceedings would be so tainted as to require a new hearing. A determination of the Township's Motion to Disqualify Counsel, although a collateral federal issue, will ultimately determine the outcome of a hearing on the merits of Kenvue's Petition for Appointment of Board of Viewers. The decision on a federal question sought by the Township will not, therefore, prove to be unnecessary and irrelevant to the complete disposition of later pending litigation. To the contrary, it is intimately connected with and absolutely necessary to the complete disposition of the underlying litigation. *Hope v. Atlantic CLR Co.*, 345 U.S. 379 (1953).

The Order of the Supreme Court of Pennsylvania is, therefore, final within the meaning of 28 U.S.C. §1257, and subject to federal appellate jurisdiction.

II. The trial court's failure to grant petitioner an evidentiary hearing on its Motion to Disqualify Counsel has deprived petitioner of due process.

The Township of Kennedy faces deprivation of a property interest resulting from the representation of an adverse party by biased counsel. It faces this deprivation without the safeguard of a hearing prior to the deprivation. Kenvue Development, Inc. and Kenvue Service Company seek monetary relief from the Township for an alleged *de facto* condemnation of its property. The Township, by its Motion to Disqualify Counsel, seeks to prevent that significant taking of property, one which clearly falls within the protection of the Fourteenth Amendment. *Fuentes v. Sheven*, 407 U.S. 67 (1972). The Township and its officers are entitled to "due and regular process in the pleading, hearing, consideration and disposition of litigated claims." *Martin v. Neuschel*, 396 F.2d 759, 760 (3d Cir. 1968).

Because the Township contends that it is entitled to pre-deprivation process, its claim must be examined in light of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail". *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Kenvue seeks recompense from the Township for the alleged condemnation of its property. The interest sought to be protected and which is affected by the failure of the trial court to provide a hearing is that of a municipality, one which is accountable to its residents for financial losses, losses which must be recouped by the

imposition of taxes upon those residents. To proceed to hearing on the merits of Kenvue's claim without the safeguard of fairness in judicial proceedings, seriously and immediately impacted upon its ability to defend itself against Kenvue's claim to the ultimate detriment of the residents of the Township.

The Township has also a fundamental right to fairness and judicial proceedings, a right which it was not accorded by the trial court since the Township had no opportunity to offer evidence and be heard on the issue of disqualification of Kenvue's counsel. The judicial proceedings in this matter will determine far-reaching and important rights of the Township, including the validity of an agreement made between the Township and Kenvue regarding interconnection of sewer lines to numerous residents.

The procedures utilized by the trial court were constitutionally inadequate to protect those important private rights. The trial court did not permit evidence to be submitted on the possibility of prejudice of Kenvue's counsel. The Township was not afforded the opportunity by the trial court to produce, through testimony, the extent of disputed counsel's participation on behalf of the Department of Environmental Resources and his close and continual involvement with the Township in the actions taken by the Department of Environmental Resources which preceded and led to the underlying litigation. The trial court, without the benefit of an evidentiary hearing, acted blindly when it ruled on the Motion to Disqualify. The risk of deprivation of a fair trial for the Township is thus extremely high. An evidentiary hearing would have greatly reduced this risk. The decision before the trial court was clearly rooted in questions of fact. Due process, therefore, mandates that the opportunity to confront and cross examine witnesses be afforded. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The deprivation of property faced by the Township must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The Township was afforded no opportunity for hearing prior to the commencement of litigation on the underlying claim of Kenvue. Whatever the minimal due process requirements may be, none were afforded the Township, and at a minimum, the Township must be afforded the opportunity to present evidence to the trial court upon which it may fairly base its decision as to whether counsel's involvement in matters directly relating to this litigation preclude him under the Rules of Professional Conduct promulgated by the Pennsylvania Supreme Court from continuing his representation of Kenvue. The final factor to be considered under the *Eldridge* test, that is, the government's interest in minimizing the fiscal and administrative burdens that any additional procedural requirements would entail, *Id.*, at 335, is minimal compared with the harm faced by the Township. Although clearly the state has an interest in the efficient and expeditious resolution of claims, the burden upholding an evidentiary hearing at this point in the litigation is small when compared with the possibility that the entire trial would be tainted with the stain of biased counsel. If, for example, on subsequent appeal, it were to be determined that counsel should have been disqualified, a far greater burden on the judicial system will result as well as an extremely heavy burden on all parties if compelled to re-try the case.

The threat of deprivation of the property of the Township, and ultimately that of its citizens, in light of the trial court's failure to grant an evidentiary hearing when compared with the minimal state interest in avoiding such a requirement is worthy of review.

III. The Supreme Court of Pennsylvania by acquiescing in the use of the doctrine of laches by the trial court decided a question of substance in a way not in accord with applicable decisions of the Supreme Court of Pennsylvania.

Two opposing policies are at work in determining whether a Motion for Disqualification of Counsel can be barred by the doctrine of laches: preventing hardship on the client if counsel is sought to be disqualified, and preventing a continuing breach of the Code of Professional Responsibility. The Court of Common Pleas rendered the Opinion which the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania refused to review. That Opinion denied the Motion to Disqualify Counsel based solely on considerations of hardship to Kenvue. The Court of Common Pleas held that although there was no evidence of tactical motivation on the part of Kennedy Township in bringing the Motion it was brought late, and therefore, should be denied based on the harm to Kenvue.

The policy of preventing a breach of the Code of Professional Responsibility is equally important. In *American Dredging Co. v. City of Philadelphia*, 480 Pa. 177, 389 A.2d 568 (1978), the Pennsylvania Supreme Court rejected the notion that a Motion to Disqualify Counsel may be dismissed on the basis of timeliness:

No specific rule of court governs the timeliness of a Motion to Disqualify based on alleged ethical violations of the challenged attorney. The court's responsibility cannot be defeated by the laches of the party seeking disqualification, at least where the Motion to Disqualify is made prior to the commencement of trial.

480 Pa. at 183, 389 A.2d at 571.

The Third Circuit has similarly held that a Motion to Disqualify may not be barred by the doctrine of laches. *Emle Industries, Inc. v. Glen Raven Mills, Inc.*, 478 F.2d 562 (3d Cir. 1973):

Since, as we have noted, disqualification is in the public interest, the court cannot act contrary to that interest by permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility. Accordingly, "the court's duty and power to regulate the conduct of attorneys practicing before it, in accordance with the canons, cannot be defeated by the laches of a private party or complainant." *Empire Linotype School*, 143 F.Supp. at 631.

478 F.2d at 574.

The Township's Motion was made prior to the commencement of trial and, as the Court of Common Pleas observed, without evidence of tactical motivation.

The Canons of the Code of Professional Responsibility in Pennsylvania have the force of statutory rules of conduct. *Commonwealth v. Eastern Dawn Mobile Home Park, Inc.*, 486 Pa. 326 (1979).

Counsel sought to be disqualified, Richard Ehmann, was a public employee representing the Pennsylvania Department of Environmental Resources and had substantial responsibility in the action which ordered the Township to interconnect its sewer system with the existing system located in the Kenvue Plan. In its Petition for Appointment of Viewers, Kenvue contends that the Department of Environmental Resources acted on behalf and/or in conjunction with the Township of Kennedy to deprive it of its property. The acts complained of are those of Mr. Ehmann.

There is a significant risk that the interest the attorney represents as private counsel will conflict with the interest that he or she represented as a public employee. Such conflict or potential conflict results in impropriety or the appearance of impropriety which is a basis for disqualification of the attorney.

City of Philadelphia v. District Council 33, 503 Pa. 498, 502, 469 A.2d 1051, 1053 (1983).

There is a significant and real risk that the interest represented by Mr. Ehmann as private counsel for Kenvue will conflict with the interest he represented as counsel to a state agency. Mr. Ehmann was intimately acquainted with the facts and issues involved in the instant litigation as a result of his representation of the Department of Environmental Resources. Those facts, issues and actions directly led to the filing of Kenvue's petition seeking compensation.

The significant public interest and the scrupulous ethical administration of justice mandated by Cannon 9 of the Code of Professional Ethics would be violated by Mr. Ehmann's continued representation of Kenvue. The public interest was not accorded due weight by the trial court and is thus worthy of review.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JUBELIRER, PASS & INTRIERI, P.C.

By: Joseph J. Pass

JOSEPH J. PASS

219 Fort Pitt Boulevard

Pittsburgh, Pennsylvania 15222

(412) 281-3850

Counsel for Petitioner

APPENDIX

Order of the Supreme Court of
Pennsylvania, Western District

(SEAL)

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

801 City-County Building
Pittsburgh, PA
15219
(412) 565-2816

Prothonotary
IRMA T. GARDNER
Deputy Prothonotary

May 30, 1989

Joseph J. Pass, Esquire
JUBELIRER, PASS & INTRIERI, P.C.
219 Fort Pitt Boulevard
Pittsburgh, PA 15222

In Re: *Petition of Kenvue Development, Inc.,
etc., et al.*
Petition of: Township of Kennedy
No. 598 W.D. Allocatur Docket 1988

Dear Mr. Pass:

The Court has entered the following Order on your
Petition for Allowance of Appeal in the above-captioned
matter:

"May 30, 1989
Petition Denied
Per Curiam"

Mr. Justice Zappala did not participate in the
consideration or decision of this case."

Very truly yours,

ITG/dad

cc: Leonard Mendelson, Esq.
Joseph M. Kulik, Esq.
Honorable Raymond L. Scheib

IRMA T. GARDNER
Irma T. Gardner
Deputy Prothonotary

**Order of the Commonwealth Court
of Pennsylvania**
**IN THE COMMONWEALTH COURT
OF PENNSYLVANIA**

No. 470 Misc. Dkt. No. 4

TOWNSHIP OF KENNEDY,
Petitioner,

v.

**KENVUE DEVELOPMENT, INC., a
Pennsylvania corporation, et al.,**
Respondents.

ORDER

PER CURIAM

NOW, October 13, 1988, upon consideration of petitioner's petition for permission to appeal and the brief in opposition thereto, said petition is denied.

**CERTIFIED FROM THE RECORD
AND ORDER EXIT**

OCT 14 1988

C.R. Hostutler

Deputy Prothonotary—Chief Clerk

**Order of Court of the Court
of Common Pleas of Allegheny
County, Pennsylvania**

Exhibit "A"

**IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

No. 78-26458

**PETITION OF KENVUE DEVELOPMENT, INC., a
Pennsylvania corporation, and KENVUE SERVICE
COMPANY, a Pennsylvania corporation, FOR THE
APPOINTMENT OF VIEWERS TO ASCERTAIN
THE JUST COMPENSATION DUE PETITIONERS
ARISING FROM THE *DE FACTO*
CONDEMNATION OF THEIR PROPERTIES IN
THE TOWNSHIP OF KENNEDY.**

ORDER OF COURT

**AND NOW, to-wit, this 23rd day of August, 1988,
based upon the within Motion, it is hereby ORDERED
that this Court's Interlocutory Order of July 12, 1988,
involves a controlling question of law as to which there is
a substantial ground for difference of opinion and that an
immediate appeal from the Order may materially
advance the ultimate termination of this case.**

BY THE COURT:

SCHEIB, J.

**Opinion and Order of the Court of
Common Pleas of Allegheny
County, Pennsylvania**

**IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

No. 78-26458

**PETITION OF KENVUE DEVELOPMENT, INC., a
Pennsylvania corporation, and KENVUE SERVICE
COMPANY, a Pennsylvania corporation, FOR THE
APPOINTMENT OF VIEWERS TO ASCERTAIN
THE JUST COMPENSATION DUE PETITIONERS
ARISING FROM THE *DE FACTO*
CONDEMNATION OF THEIR PROPERTIES IN
THE TOWNSHIP OF KENNEDY.**

**OPINION and ORDER OF COURT—DENYING ALL
THREE MOTIONS FOR DISQUALIFICATION &
PERMITTING ALL PARTIES TO RETAIN THEIR
COUNSEL**

SCHEIB, J.

Code _____

Copies of opinion & order sent to:

**Joseph J. Pass, Esquire
Leonard M. Mendelson, Esquire
Joseph M. Kulik, Esquire**

OPINION

SCHEIB, J.

This condemnation case has become a battle of disqualifications. Kennedy Township, represented by Joseph Pass and his firm of Jubelirer, Pass & Intrieri, wants to remove the firm of Hollinshead and Mendelson from its representation of Kenvue Development, Inc. The Kennedy Township Municipal Sewage Authority, represented by Joseph M. Kulik and his firm, King & Kulik, also wants to remove Hollinshead and Mendelson from its representation of Kenvue Development, Inc. Kenvue Development, Inc., represented by the firm of Hollinshead and Mendelson, wants to remove Joseph M. Kulik and the firm of King & Kulik from their representation of the Kennedy Township Municipal Sewage Authority.

Kennedy Township traces the activity of the Department of Environmental Resources in the present case, beginning with citations issued to Kenvue Development by the Department for dumping raw sewage into streams along its property. At Kenvue's urging, the Township applied to the Department of Environmental Resources for a sewage permit. The Department also approved a sewage needs plan completed by the Township. In 1978, the Township sewage plan was completed, and the Department directed Kenvue to abandon its sewage system and join the Township's.

During these proceedings, Richard S. Ehmann actively represented the Department of Environmental Resources. He now is a member of the Hollinshead and Mendelson firm. This leads Kennedy Township to argue that a lawyer should not accept employment in a matter

where he could be called as a witness. Disciplinary Rule 5-101(B). Kennedy Township argues that Ehmann was well aware that he might be called as a witness, and that mere possibility ought to disqualify him.

Kennedy Township cites Disciplinary Rule 9-101(B) too. That Rule directs a lawyer who enters private practice after working as a public employee not to accept work in a matter that he was substantially responsible for as a public employee.

Hollinshead and Mendelson argues that none of Ehmann's testimony would be contested or necessary. The firm sent notice of Ehmann's employment directly to Joseph Pass, yet this Motion for Disqualification was filed 17 months later. The firm maintains that even though he works for Hollinshead and Mendelson, Richard Ehmann has had nothing to do with this litigation. He has been screened from participation.

Disqualifying Hollinshead and Mendelson would work a hardship on Kenvue Development, Inc. The Eastern District Court stated that a late motion to disqualify would impose much hardship on the client. *Freeman v. Kulicke & Soffa Industries*, 449 F.Supp. 974 (E.D. Pa. 1978). The same situation exists here. To ask Kenvue to procure new counsel would hinder their interests in this matter; it is not in the best interests of justice.

Kennedy Township brought this motion late. The Eastern District Court warned of tactical motivations in bringing a disqualification motion close to the hearing of the underlying matter in the case. There may have been no tactical motivation in this instance, but little explanation is offered to state why, if Ehmann's new employment would prejudice Kennedy Township, Kennedy Township waited 17 months to file the motion

and to recognize a conflict. If no conflict had arisen during the intervening 17 months, why would one suddenly exist?

Vague assertions of prejudice will not serve to disqualify. *Freeman, supra*; *Kroungold v. Triester*, 521 F.2d 763 (3d Cir. 1975). The prejudice that Ehmann's testimony would produce must be demonstrated, but Kennedy Township has failed to do so. "Where the contention of the movant that prejudice will or may result from the testimony of counsel or a partner is rebutted by an assertion of opposing counsel that that testimony will not or may not be prejudicial, the movant's assertion is not sufficient grounds for disqualification, at least where the motion is made long after the initiation of discovery and shortly before trial." *Freeman* at 976. The Comment on D.R. 5-102(B) written by the Special Committee for the Evaluation of Ethical Standards warned that it "was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel." *Kroungold* at 766. Kennedy Township has not outlined any specific prejudice, and Kenvue has contended that Ehmann's testimony is unnecessary in the condemnation matter.

Kenvue has stated that Ehmann has had nothing to do with this case, that the firm has screened him from involvement in the matter. Screening in matters such as this one is an acceptable procedure. It has been approved by the U.S. Court of Claims. *Kesselhaut v. United States*, 555 F.2d 791, 214 Ct. Cl. 124 (1977). "We share the view expressed in the above-mentioned Formal Opinion 342 that an inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh and should be mitigated by appropriate screening such as we now have here,

when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil, which a knowledge of the facts will dissipate." See also *Central Milk Producers Co-op v. Sentry Food Stores, Inc.*, 573 F.2d 988 (8th Cir. 1978); *Kadish v. Commodity Future Trading Commission*, 553 F.Supp. 660 (N.D. Ill. 1982).

The Sewage Authority argues that Ehmann's testimony will be important, and cites facts from Hollinshead and Mendelson's Motion to Disqualify Joseph Pass and his firm that seems to point to someone who had much familiarity with the case: Mr. Pass's intense pressure on the Department of Environmental Resources; Mr. Pass's 30 trips and 200 telephone calls to the Department; Mr. Pass's role in revoking the sewage permit.

The Kennedy Township Municipal Sewage Authority has also failed to demonstrate the importance of Richard Ehmann's testimony, despite the introduction of facts that could have been culled in other ways. These facts pertain to the controversy surrounding the sewage permit, not the condemnation case. The possibility of reward would not implicate Ehmann; the firm of Hollinshead and Mendelson has established procedures to screen Ehmann from involvement in this case. A Motion to Disqualify may be brought at any point in the proceedings when an impropriety is discovered, but the Authority has not shown why the impropriety, discovered 17 months after Ehmann joined the firm, could not be discovered when he joined the firm.

To dismiss the entire firm would work an injustice to Kenvue and it would not be in the interests of justice. As long as Hollinshead and Mendelson maintains its screening, it should be permitted to continue as counsel for Kenvue.

Hollinshead and Mendelson argues what was argued by Kennedy Township: namely, that since Peter King is listed as a witness by the Township and the Authority and Kenvue, he should not be permitted to act as counsel and neither should his firm, King & Kulik.

King & Kulik argues that Peter King was listed as a matter of course; there is little likelihood that he will actually be called to testify, though. His listing is also regarded by King & Kulik as a mistake; a poor one, yes, but a mistake.

The Motion to Disqualify King & Kulik brought by Hollinshead and Mendelson is also denied. This motion was brought after the motions for disqualification brought by Kennedy Township and the Kennedy Township Municipal Sewage Authority, so that it has the smell of a retaliatory motion. This motion should be denied because there are no specific prejudices enumerated that would be caused by Mr. King's testimony; there is no likelihood that he will be called anyway. King & Kulik has contradicted the assertion by Hollinshead and Mendelson that King's testimony will be important.

All three motions for disqualifications are denied and all parties are hereby permitted to retain their present counsel.

ORDER OF COURT

SCHEIB, J.

AND NOW, to-wit, this 12th day of July, 1988, this Court denies all three motions for disqualification and permits all parties to retain their present counsel.

BY THE COURT:

SCHEIB, J.